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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER  
 OF THE UNIVERSITY OF CALIFORNIA,  
 HASTINGS COLLEGE OF THE LAW f/k/a  
 HASTINGS CHRISTIAN FELLOWSHIP, a  
 student organization at University of  
 California, Hastings College of the Law,

Plaintiff,

vs.

MARY KAY KANE, *et al.*,  
 Defendants.

Civil Action No.: C 04 4484 JSW

Action Filed: October 22, 2004

PLAINTIFF'S NOTICE OF MOTION FOR  
 SUMMARY JUDGMENT AND  
 MEMORANDUM IN SUPPORT OF  
 MOTION FOR SUMMARY JUDGMENT

Hearing Date: December 2, 2005

Time: 9:00 a.m.

Judge: Hon. Jeffrey S. White

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u> .....	i
<u>TABLE OF AUTHORITIES</u> .....	iii
<u>NOTICE OF MOTION FOR SUMMARY JUDGMENT</u> .....	1
<u>MEMORANDUM OF POINTS AND AUTHORITIES</u> .....	1
I. <u>STATEMENT OF FACTS</u> .....	1
A.    The Christian Legal Society and the CLS Chapter at the University of California, Hastings College of the Law Generally. ....	1
1.    National Christian Legal Society. ....	1
2.    The CLS chapter at Hastings. ....	2
B.    Hastings and Student Groups Generally. ....	3
C.    CLS at Hastings’ Difficulty in Registering with Hastings. ....	5
D.    Hastings’ Treatment of Other Registered Student Organizations. ....	6
E.    Consequences of Hastings’ Denial of Registration and Attendant Rights, Benefits and Privileges.....	7
II. <u>ARGUMENT AND CITATION OF AUTHORITY</u> .....	8
A.    Right of Expressive Association. ....	9
1.    CLS at Hastings is engaged in protected expressive activity. ....	10
2.    Defendants’ policies “significantly affect” CLS at Hastings’ expression.....	11
B.    Free Speech Clause: Exclusion of CLS at Hastings from Defendants’ Speech Forum. ....	14
C.    Free Exercise Clause. ....	17
1.    Defendants’ exclusion of CLS at Hastings runs afoul of <i>Smith</i> . .	17
2.    The Free Exercise Clause also forbids intrusion into CLS at Hastings’ matters of faith and doctrine. ....	18

1	D.	Equal Protection Clause. ....	19
2	E.	Defendants’ Denial of Registration to CLS at Hastings Fails Strict	
3		Scrutiny. ....	21
4	F.	CLS at Hastings is Entitled to Injunctive and Declaratory Relief.....	24
5	1.	Irreparable Injury.....	24
6	2.	No Adequate Remedy at Law. ....	25
7			
8	III.	<u>CONCLUSION</u> .....	25
9		<u>CERTIFICATE OF SERVICE</u> .....	27

TABLE OF AUTHORITIES

<i>American-Arab Anti-Discrimination Committee v. Reno</i> , 70 F.3d 1045 (9 <sup>th</sup> Cir. 1995) .....	24, 25
<i>American Civil Liberties Union of Virginia, Inc. v. Radford College</i> , 315 F. Supp. 893 (W.D. Va. 1970) .....	14
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	8, 9
<i>Board of Directors of Rotary International v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987) .....	24
<i>Board of Regents v. Southworth</i> , 529 U.S. 217 (2000) .....	14
<i>Bollard v. California Province of the Society of Jesus</i> , 196 F.3d 940 (9 <sup>th</sup> Cir. 1999) .....	19, 22
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000) .....	<i>passim</i>
<i>Brown v. California Dept. of Transp.</i> , 321 F.3d 1217 (9 <sup>th</sup> Cir. 2003) .....	24
<i>Business Objects, S.A. v. Microstrategy, Inc.</i> , 381 F. Supp. 2d 1107 (N.D. Cal. 2005) .....	8
<i>Capital Sq. Review Bd. v. Pinette</i> , 515 U.S. 753 (1995) .....	14, 16
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993) .....	17
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994) .....	23
<i>Corporation of the Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987) .....	19
<i>Democratic Party v. Wisconsin</i> , 450 U.S. 107 (1980) .....	12
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....	24

1	<i>Elvig v. Calvin Presbyterian Church,</i>	
2	397 F.3d 790 (9 <sup>th</sup> Cir. 2005) .....	22
3	<i>Employment Division v. Smith,</i>	
4	494 U.S. 872 (1990) .....	17, 18
5	<i>E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.,</i>	
6	213 F.3d 795 (4 <sup>th</sup> Cir. 2000) .....	19
7	<i>Fowler v. Rhode Island,</i>	
8	345 U.S. 67 (1953) .....	18
9	<i>Gay Alliance of Students v. Matthews,</i>	
10	544 F.2d 162 (4 <sup>th</sup> Cir. 1976) .....	25
11	<i>Gellington v. Christian Methodist Episcopal Church,</i>	
12	203 F.3d 1299 (11 <sup>th</sup> Cir. 2000) .....	22
13	<i>Good News Club v. Milford Central School,</i>	
14	533 U.S. 98 (2001) .....	16
15	<i>Healy v. James,</i>	
16	408 U.S. 169 (1972) .....	<i>passim</i>
17	<i>Hishon v. King &amp; Spalding,</i>	
18	467 U.S. 69 (1984) .....	10
19	<i>Hurley v. Irish-American Gay, Lesbian, Bisexual Group of Boston,</i>	
20	515 U.S. 557 (1995) .....	<i>passim</i>
21	<i>Hutchison v. Thomas,</i>	
22	789 F.2d 392 (6 <sup>th</sup> Cir. 1986) .....	22
23	<i>IDK, Inc. v. County of Clark,</i>	
24	836 F.2d 1185 (9 <sup>th</sup> Cir. 1988) .....	9
25	<i>Kedroff v. St. Nicholas Cathedral,</i>	
26	344 U.S. 94 (1952) .....	19
27	<i>Kleindienst v. Mandel,</i>	
28	408 U.S. 753 (1972) .....	10
	<i>Maurer v. Individually and as Members of Los Angeles County Sheriff's Dept.,</i>	
	691 F.2d 434 (9 <sup>th</sup> Cir. 1982) .....	25

1	<i>McClure v. Salvation Army,</i>	
2	460 F.2d 553 (5 <sup>th</sup> Cir. 1972) .....	22
3	<i>Meinhold v. Dept. of Defense,</i>	
4	34 F.3d 1469 (9 <sup>th</sup> Cir. 1994) .....	22
5	<i>Minker v. Baltimore Annual Conf. of United Methodist Church,</i>	
6	894 F.2d 1354 (D.C. Cir. 1990) .....	22
7	<i>Natal v. Christian and Missionary Alliance,</i>	
8	878 F.2d 1575 (1 <sup>st</sup> Cir. 1989) .....	22
9	<i>Niemotko v. Maryland,</i>	
10	340 U.S. 268 (1951) .....	20
11	<i>Orantes-Hernandez v. Thornburgh,</i>	
12	919 F.2d 549 (9 <sup>th</sup> Cir. 1990) .....	24
13	<i>Rayburn v. General Conf. of Seventh-day Adventists,</i>	
14	772 F.2d 1164 (4 <sup>th</sup> Cir. 1985) .....	22
15	<i>Roberts v. United States Jaycees,</i>	
16	468 U.S. 609 (1984) .....	9, 10, 12, 18
17	<i>Roe v. Cheyenne,</i>	
18	124 F.3d 1221 (10 <sup>th</sup> Cir. 1997) .....	13
19	<i>Rosenberger v. Rector and Visitors of the University of Virginia,</i>	
20	515 U.S. 819 (1995) .....	14, 16, 17
21	<i>Scharon v. St. Luke's Episcopal Presbyterian Hosp.,</i>	
22	929 F.2d 360 (8 <sup>th</sup> Cir. 1991) .....	22
23	<i>S.E.C. v. Koracorp Industries, Inc.,</i>	
24	575 F.2d 692 (9 <sup>th</sup> Cir. 1978) .....	13
25	<i>Serbian Eastern Orthodox Diocese v. Milivojevich,</i>	
26	426 U.S. 696 (1976) .....	19
27	<i>Sherbert v. Verner,</i>	
28	374 U.S. 398 (1963) .....	18
	<i>Shaliehsabou v. Hebrew Home of Greater Washington, Inc.,</i>	
	363 F.3d 299 (4 <sup>th</sup> Cir. 2004) .....	19

1	<i>Sioux City Bridge Co. v. Dakota County</i> ,	
2	260 U.S. 441 (1923) .....	19
3	<i>Squaw Valley Development Co. v. Goldberg</i> ,	
4	375 F.3d 936 (9 <sup>th</sup> Cir. 2004) .....	20
5	<i>Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly</i> ,	
6	309 F.3d 144 (3 <sup>rd</sup> Cir. 2002) .....	18
7	<i>The Florida Star v. B.J.F.</i> ,	
8	491 U.S. 524 (1989) .....	23
9	<i>Village of Willowbrook v. Olech</i> ,	
10	528 U.S. 562 (2000) .....	19, 20
11	<i>Widmar v. Vincent</i> ,	
12	454 U.S. 263 (1981) .....	<i>passim</i>
13	<i>Young v. Northern Illinois Conf. of United Methodist Church</i> ,	
14	21 F.3d 184 (7 <sup>th</sup> Cir. 1994) .....	22
15	<u>STATUTES</u>	
16	42 U.S.C. § 2000e-1(a) (2005) .....	15, 21
17	Cal. Educ. Code § 66270 (2005) .....	15
18	Cal. Gov. Code § 12926 (2005) .....	21
19	Conn. Gen. Stat. § 46a-81p (2005) .....	23
20	Fed. R. Civ. P. 56 (2005) .....	8
21	Haw. Rev. Stat. § 378-3(5) (2005) .....	23
22	Me. Rev. Stat. Ann. tit. 5, § 4553(10)(G) (2005) .....	23
23	Md. Ann. Code art. 49B, § 18(2) (2005) .....	23
24	Mass. Gen. Laws. Ann. ch. 151B, § 1(5) (2005) .....	23
25	Minn. Stat. Ann. § 363A.20(2) (2005) .....	23
26	Nev. Rev. Stat. 613.320.2 (2005) .....	23
27	N.H. Rev. Stat. Ann. § 354-A:2:VII (2005) .....	23

1	N.J. Rev. Stat. Ann. § 10:5-12(a) (2005) .....	23
2	N.M. Stat. Ann. § 28-1-9(C) (2005) .....	23
3	N.Y. Exec. Law § 296(11) (2005) .....	23
4	R.I. Gen. Laws § 28-5-6(15) (2005) .....	23
5	Vt. Stat. Ann. tit. 21 § 495(e) (2005) .....	23
6	Wis. Stat. Ann. § 111.36(2) (2005) .....	23

OTHER AUTHORITIES

9	Amicus Brief of the American Psychological Association, <i>et al.</i> in <i>Romer v. Evans</i> ,	
10	1995 WL 17008445 .....	23



## SUMMARY OF ARGUMENT

Defendants denied the Christian Legal Society chapter at Hastings access to the open speech forum it created for student groups because the chapter requires its leaders – and those who select them – to share the group’s religious commitments and the moral conduct standards that are derived from those commitments. By doing so, Defendants put the chapter to an unenviable choice of relinquishing one of two things critical to its existence and mission: either its defining religious commitments or access to the channels of communication, funding, and meeting space necessary for the group to have a meaningful presence on campus.

The First Amendment to the United States Constitution does not permit governments to put religious individuals and organizations in such a position. The Free Speech Clause protects the right of individuals to gather together around shared beliefs so that they can live out those beliefs in community. *See* Part II.A, *infra*. It also prevents government from ejecting speakers from open fora created for speakers like themselves. *See* Part.II.B, *infra*. The Free Exercise Clause protects the freedom of religious individuals to exercise their beliefs without undue government interference. *See* Part II.C, *infra*. The Equal Protection Clause requires that the government treat similarly situated individuals in the same manner, without making any irrational or arbitrary distinctions.

Defendants have concluded that the CLS chapter's religiously profound acts of self-definition and self-expression violate school policies aimed at religious and sexual orientation discrimination. The College cannot show that its abridgement of the chapter's constitutionally protected rights is the least compelling means of achieving a compelling state interest. *See* Part II.E, *infra*.

This Court should extend the protections of the First and Fourteenth Amendments to the CLS chapters and enter an order granting the group summary judgment. *See* Part II.F, *infra*.

1                                    NOTICE OF MOTION FOR SUMMARY JUDGMENT

2            TO ALL PARTIES AND THEIR COUNSEL: Please take notice that, pursuant to the  
3 order of this Court filed on August 5, 2005, on December 2, 2005, at 9:00 am, or as soon  
4 thereafter as the matter may be heard, at the United State Courthouse, 450 Golden Gate Avenue,  
5 San Francisco, California, 17th Floor, Courtroom 2, before the Honorable Jeffrey S. White,  
6 Plaintiff Christian Legal Society Chapter of University of California, Hastings College of the  
7 Law f/k/a Hastings Christian Fellowship will move this Court for summary judgment as a matter  
8 of law. The grounds for the Motion are more fully set forth in the Complaint, Plaintiff's  
9 Memorandum of Law set forth below, the Joint Stipulation of Facts for Cross-Motions for  
10 Summary Judgment, the attached Declaration of Steven H. Aden and exhibits thereto, and the  
11 rest of the record before this Court.

12                                    MEMORANDUM OF POINTS AND AUTHORITIES

13            COMES NOW Plaintiff Christian Legal Society Chapter of University of California,  
14 Hastings College of the Law f/k/a Hastings Christian Fellowship ("CLS at Hastings," "the CLS  
15 chapter," or "the chapter") and enters its Memorandum in Support of Motion for Summary  
16 Judgment as follows:

17                                    I.        STATEMENT OF FACTS

18            A.        The Christian Legal Society and the CLS Chapter at the University of  
19                        California, Hastings College of the Law Generally.

20                                    1.        National Christian Legal Society.

21            Founded in 1961, Christian Legal Society is a nationwide association of lawyers, law  
22 students, law professors, and judges who profess faith in Jesus Christ. *See* Joint Stipulation of  
23 Facts for Cross-Motions for Summary Judgment ("Joint Stip."), at ¶ 31. That shared devotion is  
24 reflected in the organization's Statement of Faith, the signing of which indicates a member's  
25 commitment to beliefs commonly regarded as orthodox in both the Protestant evangelical and  
26 Roman Catholic traditions. *See id. at* ¶ 33.

27            In light of contemporary controversies regarding human sexuality, Christian Legal  
28 Society reaffirmed in March 2004 its understanding of biblical principles of sexual morality and  
explained how that understanding derives from and reflects its Statement of Faith. *See* Exh. S to

1 Declaration of Steven H. Aden (“Aden Dec.”). Speaking through the Executive Committee of  
 2 its Board of Directors, Christian Legal Society stated, “In view of the clear dictates of Scripture,  
 3 unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an  
 4 affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualify  
 5 such an individual from CLS membership.” *Id.*; *see also* Joint Stip., at ¶ 34. Christian Legal  
 6 Society reaffirmed that *all* people – not just those who have participated in homosexual conduct  
 7 – fall short of biblical standards, and that Christ alone is able to restore the fellowship with God  
 8 that has been disrupted by humankind’s universal departure from those standards. *See id.*

9 As expressions of the beliefs its members hold in common, Christian Legal Society’s  
 10 purposes include providing a means of society, fellowship, and nurture among Christian  
 11 lawyers; promoting justice, religious liberty, and biblical conflict resolution; encouraging,  
 12 discipling, and aiding Christian law students; and encouraging lawyers to furnish legal services  
 13 to the poor. *See* First Amended Verified Complaint (“FAC”), at ¶ 3.1.

## 14 2. The CLS chapter at Hastings.

15 In furtherance of these purposes, the national Christian Legal Society organization  
 16 maintains both attorney and law student chapters across the country. *See* Joint Stip., at ¶ 31.  
 17 Plaintiff CLS at Hastings is a law student chapter of the national organization. *See id.*; *see also*  
 18 FAC, at ¶ 3.3. The group affiliated with the national Christian Legal Society for the first time in  
 19 September 2004. *See* Exh. E to Aden Dec., at 60; *see also* Exh. D to Aden Dec., at 158. The  
 20 mission of CLS at Hastings is to maintain a vibrant Christian law fellowship that enables its  
 21 members, individually and as a group, to fulfill Christ’s mandate to love God and to love their  
 22 neighbors as themselves. Exh. E to Joint Stip., at 1.

23 CLS at Hastings welcomes all students to attend and participate in its meetings and other  
 24 activities, without regard to their religious beliefs, sexual orientation, or sexual conduct. Joint  
 25 Stip., at ¶ 36. If students wish to become official voting members of CLS at Hastings, and thus  
 26 eligible to choose and serve as leaders of the chapter, amend the group’s constitution, or lead  
 27 Bible studies, they must affirm their commitment to the group’s foundational principle: a shared  
 28 faith in Jesus Christ. *Id.* Those desiring these privileges affirm that commitment by signing the

1 Christian Legal Society Statement of Faith. *See id.* at ¶ 33. As noted above, Christian Legal  
 2 Society reaffirmed in March 2004 that its Statement of Faith entails certain standards regarding  
 3 sexual conduct; therefore, a Hastings chapter leader or voting member's embrace of the  
 4 Statement of Faith necessarily entails a commitment to abide by those standards. *See* Exh. S to  
 5 Aden Dec.

6 CLS at Hastings holds weekly Bible studies led by one of the group's officers. *See* Joint  
 7 Stip., at ¶¶ 44, 49. The Bible studies cover a wide variety of topics, but are always centered on  
 8 the Christian beliefs reflected in the Christian Legal Society's Statement of Faith. *See id.* at ¶  
 9 53. The group periodically sponsors speakers at the law school covering such topics as  
 10 integrating Christian faith and the legal practice. *See id.* at ¶ 44. The group invites students to  
 11 attend Good Friday and Easter Sunday church services where its Christian beliefs are taught.  
 12 *See id.* The chapter also hosts a beginning of the year beach barbeque; an annual Thanksgiving  
 13 feast; monthly fellowship dinners; and an end-of-year banquet, all of which are open to any  
 14 student who desires to come and learn more about the group's Christian beliefs. *See id.*

15 B. Hastings and Student Groups Generally.

16 The University of California, Hastings College of the Law ("Hastings" or "College"), a  
 17 public law school, encourages the formation of student groups by providing them a number of  
 18 rights, privileges, and benefits. *See id.* at ¶ 9. Student organizations access these benefits by  
 19 registering with the law school. *See id.* These benefits include a number of channels by which  
 20 student groups communicate with the law school community about their existence, ideals, and  
 21 activities. *See id.* Among these channels of communication are (1) participation in the annual  
 22 Student Organizations Faire where student groups set up tables to hand out materials, recruit  
 23 interested students, and generally make students, especially new students, aware of their  
 24 organization's existence; (2) the ability to send "mass" email messages to all members of the law  
 25 school community through student government; and (3) appearing in lists of student  
 26 organizations in the law school publications, including its website and College Bulletin. Other  
 27 benefits include funding and access to meeting space. *See id.*

28 During the 2004-2005 school year, there were approximately 60 registered student

1 organizations at Hastings, representing an array of purposes and viewpoints. *See* Joint Stip., at ¶  
 2 7. Among them were the Black Law Students Association, the Clara Foltz Feminist Society,  
 3 Silenced Right- Pro-Life Group, Hastings Republicans, Hastings Democratic Caucus, La Raza  
 4 Students Association, Vietnamese American Law Society, and Hastings OUTLAW (a lesbian,  
 5 gay, bi-sexual, transgendered student organization). *See* Exh. A to Joint Stip.

6 Registration entails submitting a registration form, licensing agreement for use of the  
 7 College name and logo, and a copy of the student organization's constitution to the College's  
 8 Office of Student Services. *See* Exh. B to Joint Stip., at 3. The Office of Student Services  
 9 reviews student organization constitutions to determine, among other things, whether they  
 10 comply with the College's Policy on Nondiscrimination. *See* Joint Stip., at ¶ 12. The Policy on  
 11 Nondiscrimination provides:

12 The College is committed to a policy against legally impermissible, arbitrary or  
 13 unreasonable discriminatory practices. All groups, including administration,  
 14 faculty, student governments, College-owned student residence facilities and  
 15 programs sponsored by the College, are governed by this policy of  
 nondiscrimination. The College's policy on nondiscrimination is to comply fully  
 with applicable law.

16 The University of California, Hastings College of the Law shall not discriminate  
 17 unlawfully on the basis of race, color, religion, national origin, ancestry,  
 18 disability, age, sex or sexual orientation. This nondiscrimination policy covers  
 admission, access and treatment in Hastings-sponsored programs and activities.

19 *See id.* at ¶ 15.

20 In spite of the delineation of specific protected statuses in the policy, and in the absence  
 21 of any policy language so stating, Hastings interprets the Policy on Nondiscrimination such that  
 22 student organizations must allow *any* student, regardless of their status or beliefs, to participate  
 23 in the group's activities and meetings and to become voting members and leaders of the group.  
 24 *See* Joint Stip., at ¶ 18. For example, Hastings requires that the Hastings Democratic Caucus  
 25 must allow an ardent Republican to be president of the organization. *See id.* A student  
 26 organization's failure to comply with the Policy on Nondiscrimination will result in the denial of  
 27 the status and benefits of registration. *See id.* at ¶ 17. Once a group is registered, however,  
 28 Hastings does not actively check to determine whether the student organization is in fact abiding

1 by the terms of the policy. *See* Exh. A to Aden Dec., at 93.

2 C. CLS at Hastings' Difficulty Registering with Hastings.

3 Early in the 2004-2005 school year, CLS chapter vice-president Dina Haddad inquired  
4 with the Hastings Director of Student Services, Judy Chapman, about the process for registering  
5 CLS at Hastings with the law school. *See* Exh. D to Aden Dec. at 60. Haddad informed  
6 Chapman at that time that the group was affiliating with the national Christian Legal Society.  
7 *See id.* at 60-61. Chapman handed Haddad a copy of the College's Policy on Nondiscrimination  
8 and cautioned her that national organizations, like the Christian Legal Society, often have  
9 membership or leadership policies that conflict with the Policy on Nondiscrimination. *See id.* at  
10 61, 64.

11 Shortly after her meeting with Chapman, Haddad applied to the Office of Student  
12 Services for travel funds to cover a portion of the costs for her and CLS chapter president Isaac  
13 Fong to attend the Christian Legal Society's 2004 annual conference in McLean, Virginia. *See*  
14 Joint Stip., at ¶ 37. On or about September 9, 2004, Chapman awarded Haddad and Fong  
15 \$250.00 in travel funds to help with their travel expenses. *See id.*

16 About a week later, on September 17, 2004, Haddad submitted CLS at Hastings'  
17 registration form, license agreement for use of college name and logo, and constitution to the  
18 Office of Student Services in order to register with the College. *See id.* at ¶ 38. Chapman  
19 reviewed the CLS chapter's constitution and determined that the omission of the terms  
20 "religion" and "sexual orientation" from group's nondiscrimination pledge and the chapter's  
21 Statement of Faith requirement for members and officers likely ran afoul of the Policy on  
22 Nondiscrimination and referred the matter to Hastings General Counsel, Elise Traynum, for her  
23 review. *See* Exh. A to Aden Dec., at 48, 106; *see also* Exh. D to Aden Dec., at 91.

24 Four days later, on September 21, 2004, Chapman emailed Fong informing him that  
25 Traynum concluded that CLS at Hastings' constitution did in fact violate the religion and sexual  
26 orientation provisions of the Policy on Nondiscrimination and that the group's constitution  
27 would need to be revised to bring it into compliance with the policy. *See* Joint Stip., at ¶ 39; *see*  
28 *also* Exh. F to Joint Stip. Chapman also invited Fong to meet with her to discuss the conflict

1 between CLS at Hastings' constitution and the Policy on Nondiscrimination. *See See* Joint Stip.,  
 2 at ¶ 39.

3 On or about September 23, 2004, Fong, Haddad, and the CLS chapter secretary-treasurer  
 4 met with Chapman to discuss the College's concerns about CLS at Hastings' constitution. *See*  
 5 Joint Stip., at ¶ 40. At the meeting, Chapman informed the chapter officers that CLS at  
 6 Hastings' constitution was not compliant with the Policy on Nondiscrimination because the  
 7 group failed to open its membership and leadership to all students regardless of their religious  
 8 beliefs or views on homosexuality. *See id.* Chapman further informed the officers that until the  
 9 chapter's constitution was brought into compliance with the Policy on Nondiscrimination, the  
 10 group could not register with the College. *See* Exh. D to Aden Dec., at 89. Near the close of the  
 11 September 23, 2004 meeting, Haddad handed Chapman a letter prepared by counsel. *See* Joint  
 12 Stip., at ¶ 40. The letter explained that all students are welcome to attend and participate in CLS  
 13 chapter meetings. *See* Exh. G to Joint Stip. The letter also stated that a person "who has  
 14 homosexual inclinations but does not engage in or affirm homosexual conduct, would *not* be  
 15 prevented from serving as an officer or member." *See id.* The letter described CLS at Hastings'  
 16 shared belief in certain core principles as well as the application of those principles to the subject  
 17 of human sexuality, and explained how compliance with these principles was among the criteria  
 18 for choosing leaders and official voting members. *See id.*

19 On October 1, 2004, Hastings General Counsel Traynum sent a letter to CLS at Hastings  
 20 reaffirming that "to be one of our student-recognized organizations, CLS must open its  
 21 membership to all students irrespective of their religious beliefs or sexual orientation." *See* Joint  
 22 Stip., at ¶ 41; *see also* Exh. H to the Joint Stip.

23 D. Hastings' Treatment of Other Registered Student Organizations.

24 Hastings allows other registered student organizations to require that their members  
 25 and/or leaders agree with the organization's beliefs and purposes. Silenced Right- Pro-Life  
 26 Group may require its members to support its pro-life purposes (Exh. J to Aden Dec.); La Raza  
 27 Student Association may restrict its voting membership, called "Policy Members," to students of  
 28 La Raza background (Exh. 0 to Aden Dec.); Vietnamese American Law Society is free to



1 require its members to support the promotion of Vietnamese culture (Exh. I to Aden Dec.);  
 2 Hastings Motorcycle Riders Club may require its members to share an interest in owning and  
 3 riding motorcycles (Exh. L to Aden Dec.); Hastings Republicans may require that their members  
 4 and/or officers be registered Republicans (Exh. K to Aden Dec.); Hastings Health Law Journal  
 5 Development Team is free to restrict membership to students desiring to provide a forum for  
 6 discussion amongst academics and professionals in the areas of law and medicine (Exh. G to  
 7 Aden Dec.); Legal Vines, a wine tasting club, may limit its membership to students over age 21  
 8 (Exh. P to Aden Dec.); Association of Trial Lawyers of America at Hastings may limit  
 9 membership to students supporting the national and local organization's objective of promoting  
 10 the civil justice system (Exh. N to Aden Dec.); Students Raising Consciousness at Hastings may  
 11 require members to support the group's mission to educate the student body about the issues  
 12 facing certain communities, particularly race, sexual orientation, and gender (Exh. H to Aden  
 13 Dec.); and Hastings OUTLAW is free to remove officers if they fail to support the  
 14 organization's pro-homosexual goals and objectives (Exh. Q to Aden Dec.).

15 For the academic years 1994-1995 to 2002-2003, a student organization calling itself the  
 16 Hastings Christian Legal Society, although not officially affiliated with the national Christian  
 17 Legal Society, was registered with Hastings. *See* Joint Stip., at ¶ 23. Its constitution restricted  
 18 voting membership to students who acknowledged in writing their agreement with the national  
 19 Christian Legal Society's Statement of Faith.<sup>1</sup> *See* Exh. C to Joint Stip.

20 E. Consequences of Hastings' Denial of Registration and Attendant Rights,  
 21 Benefits and Privileges.

22 Since the end of September 2004, CLS at Hastings has been unregistered. *See* Joint  
 23 Stip., at ¶ 39, 40. The CLS chapter is the only unregistered student group at the College. *See*  
 24 Joint Stip, at ¶ 59. About a week after Hastings denied the group registration, Haddad received  
 25 an email from Chapman informing her that the \$250.00 set aside for she and Fong to travel to

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26  
 27 <sup>1</sup> The Policy on Nondiscrimination was adopted by Hastings in June 1990 and, thus, was  
 28 in effect for the entire period Hastings Christian Legal Society was registered with Hastings. *See* Joint  
 Stip., at ¶ 16.



the Christian Legal Society's National Conference had been withdrawn. *See id.* at ¶ 42. Although Hastings offered to allow the CLS chapter access to meeting space at the law school in its October 1, 2004 letter, CLS at Hastings met off-campus at one of the officer's apartments, because of the College's policies limiting eligibility to reserve meeting space to registered student organizations and commercial groups, such as Westlaw. *See Joint Stip.*, at ¶ 42.

On or about August 19, 2005, Fong inquired with Chapman about setting up an "advice table" in front of the law school on August 23-24, 2005 to answer questions from first year students about classes and jobs and to advertise CLS at Hastings' meeting schedule. *See Exhs. J and K to Joint Stip.* Fong also sought permission to send "mass" emails through student government; to place an announcement in the Office of Student Service's weekly newsletter, the "Hastings Weekly"; to post signs on the designated student organization bulletin boards; and to post an announcement on classroom chalkboards, all to promote the "advice table" and a bonfire at Ocean Beach. *See id.* Fong was denied permission to send out mass emails, to use the bulletin boards designated for use by student organizations, and to place announcements in the Hastings Weekly. *See id.* at ¶ 62.

On or about August 29, 2005, Fong received an email from Chapman informing him that she had consulted Hastings General Counsel Traynum and determined that because CLS at Hastings is not a registered student organization, it must remove any reference to "Hastings" from its name. *See Joint Stip.*, at ¶ 60; *see also* Exh. J. to Joint Stip.

## II. ARGUMENT AND CITATION OF AUTHORITY

"Summary judgment is appropriate when the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Business Objects, S.A. v. Microstrategy, Inc.*, 381 F. Supp. 2d 1107, 1109 (N.D. Cal. 2005), *quoting*, Fed. R. Civ. P. 56(c) (2005). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect the outcome of the case. *See id.* at 248.

1           There are no genuine issues of material fact in this case. CLS at Hastings submitted its  
 2 registration form, licensing agreement, and constitution to Defendants in order to acquire the  
 3 status and benefits of a registered student organization. Defendants denied the chapter such  
 4 status and benefits because the group refused to certify that it would open its voting membership  
 5 and officer positions to persons who oppose its religious beliefs. Moreover, Defendants' denial  
 6 of registration violates "well-established First Amendment principles," and, therefore, CLS at  
 7 Hastings is entitled to judgment as a matter of law. *Healy v. James*, 408 U.S. 169, 170-71  
 8 (1972)(holding that a state college's denial of official recognition to a local chapter of Students  
 9 for a Democratic Society was "governed by existing precedent").

10           A.     Right of Expressive Association.

11           Over thirty years ago, the United States Supreme Court held in *Healy v. James* that  
 12 "[t]here can be no doubt" that a state college's decision to withhold the status and benefits of  
 13 official recognition from a student organization because "the organization's philosophy was  
 14 antithetical to the school's policies" burdens or abridges the First Amendment right of  
 15 association. *Healy*, 408 U.S. at 175, 181; *see also Widmar v. Vincent*, 454 U.S. 263, 268-69  
 16 (1981)(holding that "our cases leave *no doubt* that the First Amendment rights of speech and  
 17 association extend to the campuses of state universities")(emphasis added). What were  
 18 considered "well-established First Amendment principles" by the Supreme Court in 1972 have  
 19 only been reinforced by the Court's more recent precedent. *Healy*, 408 U.S. at 170.

20           As recently as 2000, the Supreme Court held that "'implicit in the right to engage in  
 21 other activities protected by the First Amendment' is 'a corresponding right to associate with  
 22 others in pursuit of a wide variety of political, social, economic, educational, religious, and  
 23 cultural ends.'" *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000), *quoting, Roberts v.*  
 24 *United States Jaycees*, 468 U.S. 609, 622 (1984). *See also IDK, Inc. v. County of Clark*, 836  
 25 F.2d 1185, 1193 (9<sup>th</sup> Cir. 1988)("The freedom of expressive association permits groups to  
 26 engage in the same activities that individuals may engage in under the first amendment.")  
 27 Accordingly, "[i]mpediments to the exercise of one's right to choose one's associates can violate  
 28 the right of association protected by the First Amendment." *Hishon v. King & Spalding*, 467

U.S. 69, 80 n. 4 (1984)(Powell, J., concurring)(citation omitted). Indeed, the Supreme Court recognized in *Roberts*, “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.” *Roberts*, 468 U.S. at 623. These constitutional protections of the First Amendment are “nowhere more vital than in our schools and universities.” *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972)(internal citations and quotations omitted).

1. CLS at Hastings is engaged in protected expressive activity.

A group seeking to assert the right of expressive association must demonstrate that it “engage[s] in some form of expression, whether it be public or private.” *Dale*, 530 U.S. at 648. This threshold is minimal, however, as a group’s speech qualifies for First Amendment protection even where it lacks a “narrow, succinctly articulable message.” *Hurley v. Irish-American Gay, Lesbian, Bisexual Group of Boston*, 515 U.S. 557, 570 (1995).

In *Dale*, the Supreme Court held that the Boy Scouts were an expressive association because its leaders spent time with members, instructing and engaging them in outdoor activities in an effort to instill traditional moral values, including the understanding that homosexual conduct is unhealthy behavior. *Id.* at 649-50. Like the Boy Scouts in *Dale*, CLS at Hastings seeks to affirm and encourage certain values in its members. For the CLS at Hastings, as well as the national Christian Legal Society with which the group is affiliated, these values are embodied in a five point Statement of Faith. *See* Joint Stip., at ¶ 33. The Statement of Faith encapsulates what Christians have considered orthodox religious beliefs for millennia. CLS at Hastings requires each of its voting members and officers to agree with the Statement of Faith, because it is literally the means by which the *Christian* Legal Society at Hastings ensures that it remains Christian.

CLS at Hastings expresses the Christian beliefs articulated in its Statement of Faith both publicly and privately. For example, the chapter officers lead weekly Bible studies where these Christian beliefs are taught and discussed. *See* Joint Stip., at ¶¶ 44, 49. The CLS chapter

sponsors speakers at the law school, like Jeffery Ventrella from the Alliance Defense Fund, who has spoken on integrating Christian faith and the legal practice. *See id.* at ¶ 44. The group has invited students to attend Good Friday and Easter Sunday church services where these same Christian beliefs are professed and celebrated. *See id.* CLS at Hastings has also hosted a beach barbeque; an annual Thanksgiving feast; monthly fellowship dinners; and an end-of-year banquet, all with the hope that members of the law school community might come and become interested in learning more about the group's beliefs. *See id.* Because "it is indisputable that an association that seeks to transmit such a system of values engages in expressive activity," CLS at Hastings is unquestionably an expressive association. *Dale*, 530 U.S. at 650.

2. Defendants' policies "significantly affect" CLS at Hastings' expression.

Since CLS at Hastings engages in protected expressive activity, the Court must next determine whether Defendants' requirement that the chapter permit persons who do not share its theological beliefs, or the moral standards concerning sexual conduct that derive from those beliefs, to serve as voting members and officers, will "significantly affect" the organization's ability "to advocate public or private viewpoints." *Dale*, 530 U.S. at 650. In its analysis, the Court "must . . . give deference to [CLS at Hastings'] view of what would impair its expression." *Id.* at 653.

Defendants maintain that CLS at Hastings' requirement that its voting members and officers agree with the Statement of Faith is inconsistent with Hastings' Policy on Nondiscrimination. Yet if the chapter is to comply with the Policy on Nondiscrimination, the group will cease exist. Although a student organization with the name "CLS at Hastings" may continue to exist, it would not be the same organization that its founding officers and members intended it to be. It would be stripped of the Christian beliefs and doctrine that define what it means to be *Christian* Legal Society at Hastings as opposed to Hastings Social Club or Hastings Sports Club. Forcing CLS at Hastings to simply forego its Statement of Faith as a condition of registration is asking the group to abandon its central message. Because compliance with the religion and sexual orientation provisions of the Policy on Nondiscrimination "impair[s] the ability of the original members to express only those views that brought them together," it

1 significantly affects the group's expressive association. *Roberts*, 468 U.S. at 623.

2 Of particular note, CLS at Hastings' members and officers are the persons given  
3 responsibility to set the future course of the group. They have the power to elect and remove  
4 officers, to amend the group's bylaws and constitution, and to teach and lead group Bible  
5 studies. *See* Joint Stip., at ¶ 36. For Defendants to force CLS at Hastings to bestow this  
6 authority on any student who walks in the door, whether they accept or reject the group's core  
7 Christian beliefs, will "seriously distort its collective decisions" and, ultimately, "impair[] the  
8 group's essential function[]," to "maintain a vibrant *Christian* law fellowship on the School's  
9 campus." *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1980); *see also* Exh. E to Joint  
10 Stip. (emphasis added).

11 The Supreme Court has repeatedly held that this is exactly what the First Amendment  
12 precludes the government from doing. For example, in *Democratic Party v. Wisconsin*, 450  
13 U.S. at 122-23, the Court held that the State of Wisconsin could not force the state Democratic  
14 Party to admit Republicans and other non-Democrats into its membership ranks. In *Hurley*, 515  
15 U.S. at 574-75, the Court held that the Commonwealth of Massachusetts could not force the  
16 organizers of a St. Patrick's Day Parade to admit a "gay pride" contingent into their parade  
17 where that contingent would contradict the message the organizers intended the parade to  
18 convey. And in *Dale*, 530 U.S. at 653, the Supreme Court held the State of New Jersey could  
19 not force the Boy Scouts to enlist a gay scoutmaster, because it would "force the organization to  
20 send a message, both to the youth members and the world, that the Boy Scouts accepts  
21 homosexual conduct as a legitimate form of behavior." Likewise Defendants cannot force CLS  
22 at Hastings to include in its leadership and membership, persons that reject its Statement of  
23 Faith, including its application to human sexuality, because "the choice of [a] speaker not to  
24 propound a particular point of view . . . is presumed to lie beyond the government's power to  
25 control." *Hurley*, 515 U.S. at 574-75.

26 The practical effects flowing from Defendants' denial of recognition to CLS at Hastings  
27 also demonstrate that the group's associational rights are significantly burdened. In *Healy*, 408  
28 U.S., at 176, 181, in determining that Students for a Democratic Society's "rights protected by

the First Amendment” were violated, the Supreme Court observed that the “[d]enial of official recognition posed serious problems for the organization’s existence and growth,” including denying use of campus bulletin boards and the school newspaper. Similarly, Defendants’ refusal to register the CLS chapter directly affects the group’s “access to the customary media for communication with the administration, faculty members and other students.” *Id.* at 181. CLS at Hastings is denied use of the “Hastings Weekly,” Student Information Center folders, mass emails, designated student organization bulletin boards, listings on the Hastings website and College Bulletin, and participation in the annual Student Organizations Faire. *See Joint Stip.*, at ¶¶ 9, 62. “If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.” *Id.* Hastings’ refusal to extend these means to CLS at Hastings serves as yet another impediment to the group’s associational rights.

Moreover, while Defendants have offered CLS at Hastings access to meeting space, they also maintain that eligibility to reserve such space is limited by law school policy to registered student organizations. *See Joint Stip.*, at ¶ 10. “Although defendant[s] voluntarily ‘suspended’ enforcement of the [p]olicy at the commencement of the litigation, defendant[s] ha[ve] never revoked the offending provisions.” *Roe v. Cheyenne*, 124 F.3d 1221, 1231 (10<sup>th</sup> Cir. 1997)(holding that plaintiff’s rights were still violated where employer stopped enforcing drug policy, but would not amend or repeal its policy); *see also S.E.C. v. Koracorp Industries, Inc.*, 575 F.2d 692, 699 (9<sup>th</sup> Cir. 1978)(“fact that illegal conduct ceased provides no further support for defendants’ assurances that injunctive relief is unnecessary where the acts of contrition and process of reformation did not begin until” after commence of litigation). Accordingly, without being granted registration, CLS at Hastings enjoys access to meeting space only at that good pleasure of the Defendants. At any time, including at the conclusion of this litigation, Defendants may decide that they would prefer to allocate the CLS chapter’s meeting space to some other purpose. Because “denial of use of campus facilities for meetings and other appropriate purposes” is an “impediment to free association,” Defendants’ right of association is significantly affected. *Healy*, 408 U.S. at 181; *see also American Civil Liberties Union of*

1 *Virginia, Inc. v. Radford College*, 315 F. Supp. 893, 898 (W.D. Va. 1970)(holding that forcing  
2 ACLU student group to use college facilities on different terms than other student groups was a  
3 “restraint on first amendment rights”).

4 B. Free Speech Clause: Exclusion of CLS at Hastings from Defendants’  
5 Speech Forum.

6 CLS at Hastings’ “religious worship and discussion . . . are forms of speech and  
7 association protected by the First Amendment.” *Widmar*, 454 U.S. at 269. “[P]rivate religious  
8 speech, far from being a First Amendment orphan, is as fully protected under the Free Speech  
9 Clause as secular private expression.” *Capital Sq. Review Bd. v. Pinette*, 515 U.S. 753, 760  
10 (1995).

11 By instituting a formal registration process for student groups and offering a number of  
12 benefits, including access to channels of communication and funding, Defendants “created a  
13 forum generally open for use by students groups.” *Widmar*, 454 U.S. at 267 (holding that the  
14 University of Missouri created a forum for students by accommodating student group meetings  
15 and offering other benefits through a registration process); *Rosenberger v. Rector and Visitors of*  
16 *the University of Virginia*, 515 U.S. 819, 830 (1995)(holding that the University of Virginia’s  
17 “Student Activities Fund” was a speech forum created for the benefit of student organizations);  
18 *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000)(holding that the University of  
19 Wisconsin created a forum for student groups through its student activities fund).

20 Almost 60 student organizations are registered with Hastings. The groups range in  
21 interests from the Clara Foltz Feminist Association to Hastings Republicans. *See* Exh. A to Joint  
22 Stip. The forum includes at least three religious student groups, including one that reserves the  
23 right to expel members for “gross misconduct.” *See* Exh. A to Joint Stip. Accordingly, as a  
24 student organization at Hastings, CLS at Hastings falls within the parameters of the forum.

25 Of course, Hastings may “act[] to preserve the limits of the forum it has created.”  
26 *Rosenberger*, 515 U.S. at 829. Indeed, Defendants will likely contend that their forum is limited  
27 to student groups that do not “discriminate” and that its exclusion of CLS at Hastings is simply  
28 intended to preserve the lawful limits of the forum. Yet that is demonstrably untrue. Some of  
the students groups already in the forum “discriminate” in their selection of leaders and/or



members. For example, members of the Hastings Republicans must be registered Republican voters. *See* Exh. K to Aden Dec. Voting membership in the La Raza Student Association is restricted to students of La Raza background. *See* Exh. o to Aden Dec. Silenced Right- Pro-Life Group limits membership to students committed to the organization’s pro-life goals. *See* Exh. J to Aden Dec. The Vietnamese American Law Society confines membership to students who will respect the organization’s purpose of promoting Vietnamese culture. *See* Exh. I to Aden Dec. Hastings OUTLAW reserves the right to remove officers for working against the spirit of the organization’s pro-homosexual goals and objectives. *See* Exh. Q to Aden Dec. Ironically, even a predecessor organization to CLS at Hastings, called Hastings Christian Legal Society, was permitted to limit its voting membership to students that agree with the national Christian Legal Society’s Statement of Faith. *See* Exh. C to Aden Dec. Accordingly, in practice, Hastings’ forum is not limited to groups that do not “discriminate.”

Defendants have suggested that federal and state law preclude the school from registering student groups that discriminate on the basis of religion or sexual orientation. In response to interrogatories, Defendants even listed specific federal and state laws that allegedly bar recognition of CLS at Hastings, including California Education Code § 66270, Section 31 of the California Constitution, Title VII of the Civil Rights of Act of 1964, and Title IX of the Educational Amendments of 1972. *See* Exh. E to Aden Dec. However, none of these laws reach campus student groups. For example, California Education Code § 66270 applies only to a “program or activity conducted by any postsecondary educational institution.” Defendants go to great pains to make clear that registered student organizations are not a program or activity of the school. Indeed, the school requires each registered group to “inform members and those doing business with the organization that it is not College-sponsored and the College assumes no responsibility for its activities.” Other laws, such as Title VII of the Civil Rights of Act of 1964, do not even prohibit sexual orientation discrimination and actually explicitly exempt religious organizations from the ban on religious discrimination. *See* 42 U.S.C. § 2000e-1(a) (2005)(exempting “religious corporation[s], association[s], educational institution[s] or societ[ies]” from Title VII’s coverage as to religious discrimination). Accordingly, compliance



1 with federal and state law is not sufficient grounds to exclude CLS at Hastings from recognition.

2 “[S]peech discussing otherwise permissible subjects cannot be excluded from a . . .  
 3 forum on the ground that the subject is discussed from a religious viewpoint.” *Good News Club*  
 4 *v. Milford Central School*, 533 U.S. 98, 112 (2001). Defendants may contend that CLS at  
 5 Hastings’ membership and leadership criteria have nothing to do speech. However, in both  
 6 *Hurley* and *Dale*, the Supreme Court made clear that the selection of officers and members is  
 7 speech because it shapes the message an organization delivers. “[E]very participating unit affects  
 8 the message conveyed.” *Hurley*, 515 U.S. at 572; *see also Dale*, 515 U.S. at 648. Accordingly,  
 9 for Defendants to deny registration to CLS at Hastings because of the religious criteria it uses to  
 10 select its officers and members is religious viewpoint discrimination. Indeed, it is  
 11 indistinguishable from the University of Virginia’s exclusion of Wide Awake Productions from  
 12 the Student Activities Fund because of the group’s desire to use monies for “religious activity,”  
 13 *Rosenberger*, 515 U.S. at 832, or the University of Missouri’s denial of meeting space to  
 14 Cornerstone because of the group’s desire “to engage in religious worship and discussion.”  
 15 *Widmar*, 454 U.S. at 269. For a school to “discriminat[e] against religious speech” is to  
 16 “discriminat[e] on the basis of viewpoint” and it is always presumed unconstitutional.  
 17 *Rosenberger*, 515 U.S. at 832. *See Capital Sq. Review Bd.*, 514 U.S. at 761 (holding that strict  
 18 scrutiny applied where expression was rejected “precisely because its content was religious”).

19 Moreover, Defendants’ contention that all student organizations must forego  
 20 consideration of religious belief in their selection of leaders and members does not render the  
 21 school’s policy viewpoint neutral. Religion is the only protected class in the Policy on  
 22 Nondiscrimination that constitutes belief. Thus, religious student organizations are placed at a  
 23 distinct disadvantage to other groups in that in order to access the forum for student organization  
 24 speech they must open their membership and leadership to those who reject their religious  
 25 beliefs. They are as disadvantaged as club sports teams or political student organizations would  
 26 be were the school to prohibit student organizations from considering athletic ability or political  
 27 beliefs by all student organizations. The Defendants’ policies are no more neutral than the  
 28 policy in *Rosenberger* was viewpoint neutral because it would have denied funding for

1 “religious activity,” by religious student organizations *and* the club volleyball team,  
 2 *Rosenberger*, 515 U.S. at 832, or the policy in *Widmar* was “viewpoint neutral” because both  
 3 Cornerstone *and* the College Libertarians were prohibited from using university facilities for  
 4 “religious worship or religious teaching.” *Widmar*, 454 U.S. at 263. A nondiscrimination policy  
 5 that forbids selecting members and leaders based their *religious* beliefs, and not on the basis of  
 6 other beliefs, is a viewpoint discriminatory policy.

7 C. Free Exercise Clause.

8 Defendants also violated CLS at Hastings’ free exercise rights when they denied the  
 9 group registration and its attendant benefits. There can be no doubt that a religious organization  
 10 exercises its faith by identifying its core beliefs and by limiting its voting membership and  
 11 leadership to those who share those core beliefs and who adhere to conduct standards that derive  
 12 from those beliefs. Defendants’ Policy on Nondiscrimination, as applied to the CLS chapter,  
 13 directly impairs the group’s ability to exercise its faith in this manner.

14 1. Defendants’ exclusion of CLS at Hastings runs afoul of *Smith*.

15 Hastings may argue that its ban on religious and sexual orientation discrimination is  
 16 facially neutral and generally applicable, and thus not subject to scrutiny under the Free Exercise  
 17 Clause under *Employment Division v. Smith*, 494 U.S. 872 (1990). However, *Smith* expressly  
 18 preserved the application of strict scrutiny under the Free Exercise Clause for cases like this one.

19 First, the *Smith* court held that laws “imposing special disabilities on the basis of  
 20 religious views or religious status” are presumptively unconstitutional. *Smith*, 494 U.S. at 877;  
 21 *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)(holding  
 22 that a local law targeting the use of animal sacrifice for religious purposes violated the Free  
 23 Exercise Clause). The Policy on Nondiscrimination imposes such a special disability because it  
 24 explicitly refers to religion, but not other forms of belief. While discrimination on the basis of  
 25 numerous *statuses*, such as sex, race, and national origin, are prohibited, the only *beliefs*  
 26 circumscribed by the policy are religious. Because “the First Amendment obviously excludes all  
 27 ‘governmental regulation of religious *beliefs* as such,’” Defendants’ policy violates the Free  
 28

1 Exercise Clause. *Smith*, 494 U.S. at 877, quoting, *Sherbert v. Verner*, 374 U.S. 398, 402  
2 (1963)(emphasis added).

3 Second, in its discussion of “hybrid rights” cases that must be subjected to strict scrutiny,  
4 the *Smith* court stated, “it is easy to envision a case in which a challenge on freedom of  
5 association grounds would likewise be reinforced by Free Exercise Clause concerns.” *Smith*, 494  
6 U.S. at 882. Using the “cf.” signal, the Court invoked *Roberts*, 468 U.S. at 622, a case involving  
7 both freedom of association and a nondiscrimination rule, and quoted the following language:  
8 “An individual’s freedom to speak, to worship, and to petition the government for the redress of  
9 grievances could not be vigorously protected from interference by the State [if] a correlative  
10 freedom to engage in group effort toward those ends were not also guaranteed.” In so doing, the  
11 Court affirmed that strict scrutiny should be applied to claims that involve both freedom of  
12 expressive association and the free exercise of religion. The instant dispute is just such a case.

13 Third, the *Smith* court observed that “where the State has in place a system of individual  
14 exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without  
15 compelling reason.” *Smith*, 494 U.S. at 884. This is true whether the exemptions are available  
16 by policy or by practice. See *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167  
17 (3<sup>rd</sup> Cir. 2002)(Borough’s prohibition on Orthodox Jewish postings of lechis on power poles to  
18 demarcate an *eruv*, or area in which certain acts were prohibited on the Sabbath, was subject to  
19 strict scrutiny where “the Borough has tacitly or expressly granted exemptions from the  
20 ordinance’s unyielding language for various secular and religious . . . purposes.”); see also  
21 *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953)(Free Exercise Clause violated by enforcing  
22 ordinance banning meetings in park against Jehovah’s Witnesses while exempting other  
23 religious groups). Thus, because Defendants exempt, at least by practice, numerous student  
24 organizations from the Policy on Nondiscrimination, such as the La Raza Student Association  
25 and the Vietnamese American Law Society, the refusal to extend an exemption to CLS at  
26 Hastings is subject to strict scrutiny. See Exhs. I and O to Aden Dec.

27 2. The Free Exercise Clause also forbids intrusion into CLS at  
28 Hastings’ matters of faith and doctrine.

1 Religious freedom encompasses the “power [of religious bodies] to decide for  
 2 themselves, free from state interference, matters of . . . faith and doctrine.” *Kedroff v. St.*  
 3 *Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see also Serbian Eastern Orthodox Diocese v.*  
 4 *Milivojevich*, 426 U.S. 696, 714-14 (1976). Indeed, federal statutes recognize and even  
 5 affirmatively protect the right of religious organizations to use religious criteria in their  
 6 employment decisions. *See, e.g., Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327,  
 7 335 (1987)(upholding the constitutionality of the religious exemption in Title VII of the Civil  
 8 Rights Act of 1964). Justice Brennan has observed:

9 Determining that certain activities are in furtherance of an organization’s  
 10 religious mission, and that only those committed to that mission should conduct  
 11 them, is thus a means by which a religious community defines itself. Solicitude  
 12 for a church’s ability to do so reflects the idea that furtherance of the autonomy of  
 13 religious organizations often furthers individual religious freedoms as well.

14 *Id.* at 342 (Brennan, J., concurring).

15 The Ninth Circuit has also recognized that the “ministerial exception” to Title VII  
 16 mandated by the Free Exercise Clause prohibits government from inquiring beyond a religious  
 17 organization’s stated religious basis for its personnel decisions. *See Bollard v. California*  
 18 *Province of the Society of Jesus*, 196 F.3d 940, 946 (9<sup>th</sup> Cir. 1999); *see also E.E.O.C. v. Roman*  
 19 *Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4<sup>th</sup> Cir. 2000). The ministerial exception  
 20 protects not only churches, but other forms of religious association as well. *See Shaliehsabou v.*  
 21 *Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 310 (4<sup>th</sup> Cir. 2004). Defendants’  
 22 insistence that CLS at Hastings relinquish its Statement of Faith requirement in order to be  
 23 registered trenches on the chapter’s right of religious autonomy. Indeed, it is difficult to  
 24 conceive of greater state interference with matters of faith and doctrine than forcing a religious  
 25 organization to abandon its core religious beliefs.

#### 26 D. Equal Protection Clause.

27 “The purpose of the equal protection clause of the Fourteenth Amendment is to secure  
 28 every person within the State’s jurisdiction against intentional and arbitrary discrimination.”  
*Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), *quoting, Sioux City Bridge Co. v.*  
*Dakota County*, 260 U.S. 441, 445 (1923). In *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951),

1 the Supreme Court held that the denial of a park permit to the Jehovah's Witnesses while  
 2 permitting other groups, including religious groups, to use the park violated the Equal Protection  
 3 Clause. The Court ruled, "[t]he right to equal protection of the laws, in the exercise of those  
 4 freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer  
 5 foundation than the whims or personal opinions of a local governing body." *Id.*

6 Defendants' application of the Policy on Nondiscrimination to CLS at Hastings is  
 7 arbitrary. Defendants permit numerous other student organizations to choose members and/or  
 8 officers dedicated to their organization's cause. For example, Silenced Right- Pro-Life Group  
 9 may select members who share its pro-life goals. *See* Exh. J to Aden Dec. The Vietnamese  
 10 American Law Society can require its members to respect the organization's purpose in  
 11 promoting Vietnamese culture. *See* Exh. I to Aden Dec. Hastings OUTLAW can remove  
 12 officers if they work against the group's pro-homosexual objectives. *See* Exh. Q to Aden Dec.  
 13 Defendants, however, refuse to recognize CLS at Hastings unless the group will refrain from  
 14 considering religious beliefs in its selection of leaders and members. Accordingly, Defendants'  
 15 treatment of CLS at Hastings is "arbitrary and wholly irrational" in light of its gracious treatment  
 16 of similarly situated student groups. *Olech*, 528 U.S. at 565.

17 Defendants' treatment of the CLS chapter is also intentional. Defendants will likely  
 18 again argue that CLS at Hastings has no evidence that the school acted with any animosity or  
 19 hostility in adopting and enforcing the Policy on Nondiscrimination. Yet the CLS chapter need  
 20 not show that Defendants acted with "subjective ill will" toward the group. *Id.* Moreover,  
 21 evidence of intent can be found in a statute's "improper execution" just the same as it can be  
 22 deduced from the circumstances surrounding a statute's passage. *Id.* at 564; *see also Squaw*  
 23 *Valley Development Co. v. Goldberg*, 375 F.3d 936, 944 (9<sup>th</sup> Cir. 2004). For example, in *Olech*,  
 24 the Court found intent in the Village's deliberate demand of an easement from Grace Olech, not  
 25 in the passage of the land use regulation giving the Village the power to claim the easement. *See*  
 26 *id.* at 565. If that were not the case, many equal protection claims would never succeed since the  
 27 government can usually show that laws, such as land use regulations, are passed without the  
 28 intent to harm any particular person or class of persons. Accordingly, Defendants' deliberate

1 decision to enforce the Policy on Nondiscrimination in a distinctly different manner from which  
 2 it was enforced against other student groups is sufficient to show intent and, thus, CLS at  
 3 Hastings is entitled to judgment as a matter of law.

4 E. Defendants' Denial of Registration to CLS at Hastings Fails Strict  
 5 Scrutiny.

6 Defendants' infringement of the CLS chapter's First Amendment rights is subject to  
 7 strict scrutiny, and thus is unconstitutional unless it is "necessary to serve a compelling state  
 8 interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270; *see also*  
 9 *Dale*, 530 U.S. at 659 (regulation must "serve compelling state interests, unrelated to the  
 10 suppression of ideas, that cannot be achieved through a means significantly less restrictive of  
 11 associational freedoms"); *Healy*, 408 U.S. at 184 ("heavy burden" rests on the college" to  
 12 demonstrate appropriateness of denying SDS recognition).

13 Government does not have a compelling interest in forbidding religious organizations  
 14 from "discriminating" on the basis of a person's religious beliefs or participation in sexual  
 15 conduct deemed immoral by the religious group. Federal and state nondiscrimination laws  
 16 almost unanimously accommodate religious organizations. For example, Title VII of the Civil  
 17 Rights Act of 1964, which forbids covered employers from discriminating on the basis of  
 18 religion, explicitly permits religious organizations to take religion into account in all of their  
 19 employment decisions. *See* 42 U.S.C. § 2000e-1(a) (2005). California's state employment  
 20 nondiscrimination law contains a blanket exemption from the prohibition on employment  
 21 discrimination. *See* Cal. Gov. Code § 12926(d) (2005). Religious associations and corporations  
 22 may consider religion as well as *any* of the other protected statuses listed in the statute in making  
 23 employment decisions. *See id.* With the State conceding that it has no interest in preventing  
 24 religious organizations from considering such characteristics as race and sex in their  
 25 employment decisions, the State's College certainly cannot now claim such an interest in barring  
 26 religious groups from considering the more obviously relevant quality of religious beliefs.

27 Additionally, almost every circuit court in the country, including the Ninth Circuit, has  
 28 recognized the "'ministerial exception' to Title VII . . . carved out from the statute based on the  
 commands of the Free Exercise and Establishment Clauses of the First Amendment." *Elvig v.*



1 *Calvin Presbyterian Church*, 397 F.3d 790, 790-91 (9<sup>th</sup> Cir. 2005). *See also Natal v. Christian*  
 2 *and Missionary Alliance*, 878 F.2d 1575, 1577-78 (1<sup>st</sup> Cir. 1989); *Rayburn v. General Conf. of*  
 3 *Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4<sup>th</sup> Cir. 1985); *McClure v. Salvation Army*, 460  
 4 F.2d 553, 560 (5<sup>th</sup> Cir. 1972); *Hutchison v. Thomas*, 789 F.2d 392, 393 (6<sup>th</sup> Cir. 1986); *Young v.*  
 5 *Northern Illinois Conf. of United Methodist Church*, 21 F.3d 184, 185 (7<sup>th</sup> Cir. 1994); *Scharon v.*  
 6 *St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8<sup>th</sup> Cir. 1991); *Gellington v.*  
 7 *Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11<sup>th</sup> Cir. 2000); *Minker v.*  
 8 *Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990).  
 9 The exception relieves religious organizations not only from Title VII's prohibition on religious  
 10 discrimination but also from its prohibitions on consideration of race, sex, and national origin.  
 11 Significantly, in the Ninth Circuit, the "ministerial exception" is interpreted to exempt religious  
 12 organizations from state nondiscrimination laws in addition to Title VII. *See Bollard v.*  
 13 *California Province of the Society of Jesus*, 196 F.3d 940, 950 (9<sup>th</sup> Cir. 1999). In light of this  
 14 widespread recognition that government has no compelling interest in preventing religious  
 15 organizations from discriminating even on the basis race, sex, and national origin, it is difficult  
 16 to imagine how the Defendants could now claim such an interest in preventing religious  
 17 organizations, such as CLS at Hastings, from "discriminating" on the basis of religion.

18 Regarding sexual orientation, the CLS chapter does not exclude anyone from  
 19 membership or leadership on the basis of their "sexual orientation," *i.e.* inclinations toward  
 20 persons of the same sex. Rather CLS at Hastings believes that engaging in or advocating any  
 21 sexual conduct, whether heterosexual or homosexual, outside the confines of traditional  
 22 marriage is immoral. For example, if a student were to advocate "wife swapping" that would  
 23 preclude the student from membership or leadership just the same as promoting homosexual  
 24 conduct.<sup>2</sup> Moreover, to the extent Defendants may claim CLS at Hastings' policies, even as  
 25

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26 <sup>2</sup> The Ninth Circuit has recognized the distinction between homosexual "orientation" and  
 27 homosexual conduct in the context of policies disfavoring such conduct. *See, e.g., Meinhold v. Dept. of*  
 28 *Defense*, 34 F.3d 1469, 1477-78 (9<sup>th</sup> Cir. 1994)("there is no question that the Navy's policy is  
 constitutionally permissible to the extent it relates to homosexual *conduct*")(emphasis in original). The  
 American Psychiatric Association also acknowledges that "[s]exual orientation is different from sexual  
 behavior because it refers to feelings and self concept. Persons may or may not express their sexual

1 stated, impinge on some state interest in precluding sexual orientation discrimination, only  
 2 fifteen states have amended their employment discrimination statutes to ban discrimination on  
 3 the basis of sexual orientation. And each and every one of these statutes exempts religious  
 4 employers.<sup>3</sup>

5 Hastings itself evidently does not deem compelling its interest in preventing  
 6 discrimination. After a student organization is registered with the school, Defendants take no  
 7 action to ensure that the group is in fact complying with the Policy on Nondiscrimination.  
 8 Moreover, among the almost 60 registered student organizations are a number whose  
 9 constitutions – which are on file with the law school – that explicitly require students to be of a  
 10 particular national origin, age, or political persuasion. Indeed, the school even previously  
 11 approved a group using a former constitution from the national Christian Legal Society that  
 12 required students to affirm the same five-point Statement of Faith that is at issue in this case.  
 13 *See* Exh. C to Joint Stip. Defendants’ loose enforcement of their policy and their system of *ad*  
 14 *hoc* exemptions, ultimately, must “diminish the credibility of the government’s rationale for  
 15 restricting speech in the first place.” *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *see also*  
 16 *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989)(same).

17 In *Boy Scouts of America v. Dale*, 530 U.S. at 657-61, the Supreme Court held that New  
 18 Jersey’s interest in eliminating sexual orientation discrimination in public accommodations was  
 19 outweighed by the significant burden it imposed upon the Scouts’ expressive association rights.  
 20 *See also Hurley*, 515 U.S. at 579-581. In so holding, the Court observed that the only times it  
 21 has upheld the application of nondiscrimination laws to private associations is when it “would  
 22

23 orientation in their behaviors.” Amicus Brief of the American Psychological Association, *et al.* in *Romer*  
 24 *v. Evans*, 1995 WL 17008445, at 9. CLS at Hastings is aware of no authority for the proposition that  
 25 government has a compelling interest in preventing private associations, particularly religious  
 26 associations, from withholding membership or leadership on the basis of an individual’s sexual conduct,  
 and *Meinhold* militates against such a conclusion.

27 <sup>3</sup> *See* Cal. Gov’t Code § 12926(d); Conn. Gen. Stat. § 46a-81p; Haw. Rev. Stat. § 378-  
 28 3(5); Me. Rev. Stat. Ann. tit. 5, § 4553(10)(G); Md. Ann. Code art. 49B, § 18(2); Mass. Gen. Laws Ann.  
 ch. 151B, § 1(5); Minn. Stat. Ann. § 363A.20(2); Nev. Rev. Stat. 613.320.2; N.H. Rev. Stat. Ann. § 354-  
 A:2:VII; N.J. Rev. Stat. Ann. § 10:5-12(a); N.M. Stat. Ann. § 28-1-9(C); N.Y. Exec. Law § 296(11); R.I.  
 Gen. Laws § 28-5-6(15); Vt. Stat. Ann. tit. 21 § 495(e); Wis. Stat. Ann. § 111.36(2).



1 *not* materially interfere with ideas that the organization sought to express.” *Id.* at 657 (emphasis  
 2 added). For example, in *Board of Directors of Rotary International v. Rotary Club of Duarte*,  
 3 481 U.S. 537, 548 (1987), the Supreme Court upheld the application of a state antidiscrimination  
 4 law to require the Rotary Club to accept women members, but the Court was quick to emphasize  
 5 that “the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any  
 6 significant way the existing members’ ability to carry out their various purposes.”

7 Here, unlike the Rotary Clubs at issue in *Duarte*, forcing CLS at Hastings to open its  
 8 membership and leadership to persons who oppose or reject its religious beliefs would  
 9 undermine the very purpose of the group – to maintain a Christian fellowship. Thus, whatever  
 10 interest Defendants may claim in barring CLS at Hastings from “discriminating” on the basis of  
 11 religious beliefs, including beliefs about human sexuality, that interest is outweighed by the  
 12 tremendous burden the school imposes on the CLS chapter’s First Amendment rights.

13 Defendants lack a sufficiently compelling justification for their application of the religion  
 14 and sexual orientation provisions of the Policy on Nondiscrimination to student religious groups  
 15 like CLS at Hastings. Therefore, the school’s enforcement of these rules against the chapter  
 16 plainly violates the First Amendment and the chapter is entitled to judgment as a matter of law.

#### 17 F. CLS at Hastings is Entitled to Injunctive and Declaratory Relief.

18 In order to receive permanent injunctive relief, a plaintiff must demonstrate “the  
 19 likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at  
 20 law.” *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9<sup>th</sup> Cir. 1990); *see also American-*  
 21 *Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066-67 (9<sup>th</sup> Cir. 1995)(same).

##### 22 1. Irreparable Injury.

23 CLS at Hastings has suffered a loss of its First and Fourteenth Amendment rights at least  
 24 since September 2004 when Defendants denied the group the status and benefits of a registered  
 25 student organization. The Supreme Court has held that “the loss of First Amendment freedoms,  
 26 for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*,  
 27 427 U.S. 347, 373 (1976)(plurality opinion); *see also Brown v. California Dept. of Transp.*, 321  
 28 F.3d 1217, 1226 (9<sup>th</sup> Cir. 2003)(same). Until this Court enters injunctive relief in CLS at

Hastings' favor, the group is denied access to student activity fee funding, channels of communication, office space, the college name and logo, and definite access to meeting space. *See* Joint Stip., at ¶¶ 9, 62. Moreover, the group is denied registered status, which is itself constitutionally significant. *See Healy*, 408 U.S. at 182-83; *see also Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164-65 (4<sup>th</sup> Cir. 1976) ("Consistent with *Healy* . . . we thus reject VCU's argument that the members of GAS have suffered no infringement of their associational rights because all that has been withheld is VCU's official seal of approval"). Accordingly, CLS at Hastings has suffered and continues to suffer substantial and immediate irreparable injury.

## 2. No Adequate Remedy at Law.

There is no adequate remedy at law to compensate CLS at Hastings for the deprivation of constitutional rights the group has suffered and continues to suffer at the Defendants' hands. *See American-Arab Anti-Discrimination Committee*, 70 F.3d at 1071; *see also Maurer v. Individually and as Members of Los Angeles County Sheriff's Dept.*, 691 F.2d 434, 437 (9<sup>th</sup> Cir. 1982). Injunctive and declaratory relief are the only means to ensure that Defendants will respect CLS at Hastings' constitutional rights now and into the future.

## III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an order granting its Motion for Summary judgment.

Respectfully submitted, this 7<sup>th</sup> day of October, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was electronically filed through the District Court's ECF system and, pursuant to Local Rule 5-5(b) and the Court's General Order No. 45 Electronic Case Filing (¶ IX.A), was thereby served by means of the ECF Notice of Electronic Filing to the parties and counsel of record as follows:

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